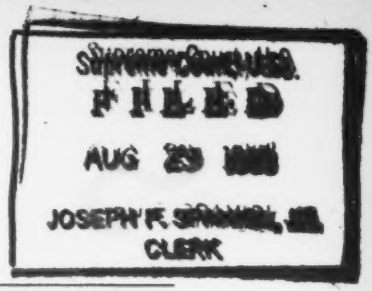
(1)

88-367

No.: _____




IN THE

# Supreme Court of the United States

**October Term, 1987**

ANTHONY RUGGIANO,

*Petitioner,*

-against-

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN L. POLLOK
*Attorney for Petitioner*
605 Third Avenue
New York, New York 10158
(212) 286-0300

CHARLES L. WEINTRAUB
*Of Counsel*

## Questions Presented for Review

1. What Is the Reach of the RICO Statute When the Theory of Prosecution is Based upon Collection of an "Unlawful Debt" as an Alternative to a Pattern of Racketeering Activity?

2. Can an "Unlawful Debt," That Is, a Debt Incurred in Connection with "The Business of Lending Money" at Usurious Rates of Interest, Be Established by Proof That a Defendant Participated in Only One Extension of Credit?

3. Does Title 18, U.S.C. § 4205(b) Authorize the Increase of a Defendant's Parole Eligibility Date Beyond the Ten-Year Limit Set by § 4205(a)?

4. Should This Court Resolve a Split of Authorities Among the Courts of Appeals Regarding the Construction of Title 18, U.S.C. § 4205?

## Table of Contents

Questions Presented for Review ..... i

Opinion Below ..... 1

Jurisdiction ..... 2

Statutes Involved ..... 2

Statement ..... 3

Reasons for Granting the Petition ..... 6

Conclusion ..... 11

Appendix A -- Opinion of United States Court of Appeals ..... 1a

Appendix B -- Order of United States Court of Appeals On Petition for Rehearing ..... 2a

## Table of Authorities

*Cases:*

Jones v. United States,
419 F.2d 593 (8th Cir. 1969) ..... 10

Rothbeg v. United States,
789 F.2d 647 (8th Cir. 1986) ..... 10

United States v. Berry,
839 F.2d 1487 (11th Cir. 1988) ..... 10, 11

United States v. Busic,
592 F.2d 13 (2d Cir. 1978) ..... 10

United States v. Castonguay,
843 F.2d 51 (1st Cir. 1988) ..... 10

United States v. Fountain,
840 F.2d 509 (7th Cir. 1988) ..... 10

United States v. Gwaltney,
790 F.2d 1378 (9th Cir. 1986) ..... 10

United States v. O'Driscoll,
761 F.2d 589 (10th Cir. 1985) ..... 10

United States v. Price,
474 F.2d 1223 (9th Cir. 1973) ..... 10

United States v. Salinas,
564 F.2d 688 (5th Cir. 1977), *cert. denied, sub. nom.* Davis v. United States,
435 U.S. 951, 98 S.Ct. 1577 (1978) ..... 8

*Statutes:*

18 U.S.C. § 2 ..... 4
18 U.S.C. § 892 ..... 3, 4
18 U.S.C. § 1955 ..... 8
18 U.S.C. § 1961(6) ..... 2, 7
18 U.S.C. § 1962(c) ..... 2, 3, 7
18 U.S.C. § 1962(d) ..... 3
18 U.S.C. § 1963 ..... 3
18 U.S.C. § 4205(a) ..... 2, 6, 9, 10, 11
18 U.S.C. § 4205(b) ..... 4, 6, 9, 10
28 U.S.C. § 1254(1) ..... 2

*Other Authorities:*

U.S. Code Cong. & Admin. News, 4007 (1970) ..... 9

116 Cong. Rec. 35193, 35196, 35208 (1970) ..... 9

H.R. Rep. No. 91-1549, 91st Cong. 2d Sess. ..... 9

S. Rep. No. 612, 91st Cong. 1st Sess. (1969) ..... 9

Sentencing Reform Act, Pub.L. No. 98-473, § 235, 98 Stat. 1834 (effective Nov. 1, 1987) ..... 9

No.: _____

IN THE

# Supreme Court of the United States

**October Term, 1987**

ANTHONY RUGGIANO,

*Petitioner,*

-against-

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Anthony Ruggiano petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

### Opinion Below

The Court of Appeals affirmed petitioner's conviction in an unpublished *per curiam* judgment (Appendix A, *infra*).

## Jurisdiction

The judgment of the Court of Appeals was entered on March 17, 1988, and a petition for rehearing was denied on June 30, 1988 (Appendix B, *infra*). The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

## Statutes Involved

Title 18, U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18, U.S.C. § 1961(6) provides:

> "Unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

Title 18, U.S.C. § 4205(a) provides:

> Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten

> years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

Title 18, U.S.C. § 4205(b) provides:

> Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

## Statement

The defendant was convicted of a substantive RICO violation (Count 2) charging him with participating in the affairs of an enterprise through a pattern of racketeering activity by engaging in or aiding and abetting the bribery of William Boone Darden, Sr. and participating in an extortionate credit transaction on December 16, 1981, in violation of 18 U.S.C. § 892 (also charged in Count 20), or alternatively collecting or aiding and abetting the collection of an unlawful debt on any one occasion, in violation of 18 U.S.C. §§ 1962(c) and 1963.

The defendant was also convicted of a conspiracy to violate the RICO substantive charge with the addition of gambling as a third predicate act (Count 1) in violation of 18 U.S.C. §§ 1962(d) and 1963, and of making or aiding

and abetting the making of an extortionate extension of credit (Count 20), in violation of 18 U.S.C. §§ 892(a) and (2) (R115:1685).[1]

On April 8, 1987, the defendant was sentenced to a term of 20 years incarceration on Count 1 and a consecutive term of 20 years incarceration on Count 2. He was sentenced to 20 years incarceration on Count 20 to run concurrently with the sentences imposed on Counts 1 and 2. Pursuant to 18 United States Code § 4205(b)(1), the Court ordered that the defendant would be eligible for parole after serving 13 years in prison (A171; R116:1736-37).

The government's principal witness, Joseph Iannuzzi, testified that at a meeting on March 7, 1981, he was introduced by Thomas Agro to the defendant, who was interested in opening a gambling club. Agro stated that Iannuzzi had been in partnership with Fred Campagnulo a/k/a Fred Campo in a gambling operation. They discussed whether Campo still had contact with William Darden, the Chief of Police of Riviera Beach. The defendant asked Iannuzzi to see if he could arrange for police protection for a gambling club (R104:159-78). Thereafter, it was agreed that Iannuzzi, Agro, and the defendant would be partners in a bottle/gambling club ("Suite 100").

In June, 1981, Iannuzzi introduced John Marino (FBI Agent John Bonino) as his partner, who would help finance and operate the club. Over a period of many months, Iannuzzi and Bonino set about leasing a suitable location, hiring a general contractor to renovate the

---

[1] "A" refers to the Record Excerpts filed in the Court of Appeals. "R" refers to the official Record on Appeal. Numbers following the prefix "R" on the left side of the colon refer to the volume number of the Record on Appeal. Numbers to the right of the colon refer to the page numbers of the cited volume. Documents are referred to by the volume number which follows "R" on the left of the colon, document number to the right of the colon, and page number to the right of the document number.

interior, and securing the necessary permits for renovation and operation of a bottle club (R105:241-43, 260-61; R110:903-07, 934-37).

Suite 100 finally opened as a bottle club on February 7, 1982 (R110:1010). While some payments had been made by Iannuzzi to Darden for police protection (R106:421-25; R107:478-85), no gambling involving the defendant ever occurred (R109:832-33).

During the course of construction, the FBI suggested that Iannuzzi request a $25,000 loan to help finance construction (R112:1160-64). Thus, on September 17, 1981, Iannuzzi spoke to the defendant with respect to a $25,000 shylock loan for Bonino to complete construction of the club. The parties agreed that the loan would be repaid from Bonino's fictitious trust fund which purportedly generated $50,000 a year in income (R105:291-310; GX98).

Ultimately, $25,000 was loaned to Bonino at two points per week interest. On December 16, 1981, Ronald Pearlman gave $10,000 to Bonino (R110:962), and on January 4, 1982, Salvatore Reale gave him $15,000 (R110:976-80, 987-91). The defendant's role in this transaction, however, remains unclear. Iannuzzi repeatedly testified that the defendant was the "arbitrator of the loan," meaning the person who arranged for the loan (R106:392; R109:730 and 736). Iannuzzi also testified that he understood the defendant to have stated that the money for the loan came from Pearlman and Reale and that it was their money and not the defendant's. While Iannuzzi testified that he does not know whose money was loaned, he conceded that in Pearlman's and Reale's trial, he testified that the $25,000 loan was not the defendant's money (R109:749-54). Bonino, however, testified that despite Iannuzzi's belief to the contrary, it was his opinion that the money belonged to the defendant (R112:1151-55).

To prove extortion in making the $25,000 loan, the prosecution relied exclusively upon a theory of implied threat. It was conceded by the prosecution that there was no overt or explicit threat in the extension of credit.

Thus, Bonino testified that the loan was made for the purpose of finishing construction of Suite 100; the defendant was working together with Bonino in the anticipated success of that venture; and he always treated Bonino courteously (R111:1083-84). It also was established that neither the defendant nor anyone else ever threatened Bonino in an attempt to collect the loan (R111:1070 and 1083), despite the fact that by the time the investigation was terminated, the loan was substantially in arrears both as to principal and interest (R111:1078-81).

Nevertheless, Iannuzzi testified that at the time the loan was made he understood that if repayment was not made as required, he and Agent Bonino would "suffer the consequences" (R105:347).

The loan was never fully repaid. Eight interest payments were made. The total payment of interest amounted to $13,400 and no principal was repaid. The interest payments were to be made on a monthly basis as specified by Iannuzzi and Bonino. In fact, when repayment of the loan was initially discussed, the defendant told Iannuzzi "set it up any way you want." (GX124).

## Reasons for Granting the Petition

This case presents questions of fundamental importance to the administration of criminal justice in the federal courts.

First, what is the reach of the RICO statute when the theory of prosecution is based upon collection of an "unlawful debt" as an alternative to a pattern of racketeering activity? Second, can an "unlawful debt," that is, a debt incurred in connection with "the business of lending money" at usurious rates of interest, be established by proof that a defendant participated in only one extension of credit? And third, whether 18 U.S.C. § 4205(b) authorizes the increase of a defendant's parole eligibility date beyond the ten-year limit set by § 4205(a).

The first two questions involve construction of Title 18, U.S.C. §§ 1962(c) and 1961(6). As an alternative to proving a defendant conducted the affairs of an enterprise through a pattern of racketeering activity in order to establish a RICO violation, § 1962(c) provides for proof of a single collection of an "unlawful debt." An "unlawful debt" is defined by § 1961(6) as "a debt (A) incurred or contracted in [unlawful] gambling activity . . . or which is unenforceable under State or Federal law . . . because of laws related to usury, and (B) which was incurred in connection with the *business of gambling* . . . or the *business of lending money* . . . at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." (emphasis added).

Interpretation of these statutory provisions is significant to the administration of justice because the RICO statutes have been ever more frequently employed by Federal prosecutors. RICO prosecutions not only account for significant numbers of Federal prosecutions, they also present some of the most complex and time-consuming criminal cases. Further, it is reasonable to anticipate that whenever possible, prosecutors will rely upon the collection of unlawful debt provision as a single collection of an unlawful debt may be more easily proven than a pattern of racketeering activity. Despite the significance of interpreting the proper scope of RICO violations predicated upon allegations of collection of an unlawful debt, there exist scant authority addressing this specific issue.[2] The defendant submits this Court should clearly state that a RICO violation can be predicated upon collection of an unlawful debt only if the debt was incurred in the course of conducting a business involving repetitive extensions of usurious loans.

In restricting the reach of RICO to debts incurred in connection with "the business of lending money," Congress clearly underscored its intent in RICO to punish

---

[2] The paucity of authority may be attributable to the fact that in RICO's initial use, prosecutors relied almost exclusively upon the pattern of racketeering provisions.

only the repetitive criminal conduct typical of "organized crime." In *United States v. Salinas*, 564 F.2d 688 (5th Cir. 1977), *cert. denied, sub. nom. Davis v. United States*, 435 U.S. 951, 98 S.Ct. 1577 (1978), the Court of Appeals construed the meaning of the parallel statutory phrase, "the business of gambling, where the law of Texas prohibited 'gambling' but did not explicitly prohibit 'the business of gambling.'" The *Salinas* Court noted carefully that federal law (18 U.S.C. § 1955) defines an "illegal gambling business" as a "substantially continuous operation" involving at least five or more individuals. *United States v. Salinas*, 564 F.2d at 691 and n.8. In explaining the importance of the inclusion of the concept of an illegal "business," the Court said:

> The defendants do not seriously contend that the business of gambling is legal in Texas. If a single act of gambling is illegal, then gambling as a means of livelihood or as an ongoing commercial operation must be illegal as well. The defendants seek to seize upon the state's not classifying gambling as precisely as does the federal statute. But it was not the intent of Congress to attack gambling only in states that classify gambling along the federal model. *The reason for the Congressional conjunctive requirement that a debt be incurred in connection with gambling and with the business of gambling was that it sought to punish only large scale gambling operations involving "organized crime" as contrasted with small time gambling.*
> Pub.L. 91-542, § 1, October 15, 1970.

*United States v. Salinas*, 564 F.2d at 691 (emphasis added).

The same explanation, of course, applies to Congress' requirement that a debt be both usurious *and* incurred in connection with the business of making usurious loans. In enacting RICO, Congress sought to punish only "large-scale" usury operations, as contrasted with small-time "loan sharking." Proof of *one* usurious loan can

hardly be said to meet that criterion. Indeed, to allow a conviction to stand when the prosecution proves only *one* usurious loan simply reads out of the statute the "conjunctive requirement" that the debt be incurred in connection with the "business" of lending money at the statutorily specified usurious rates.[3]

Proof of a single usurious loan is simply insufficient to establish a business of lending money. As the defendant maintains that the proof at trial established at worst that he was involved with only one usurious loan, his RICO convictions (Counts 1 and 2) should have been reversed and remanded for a new trial.[4]

The petition should also be granted to resolve a conflict among the Circuit Courts of Appeals concerning whether § 4205(b) authorizes a district court to increase the parole eligibility date beyond the ten-year limit established by § 4205(a).[5]

In an exhaustive and scholarly opinion, Judge Coffin, writing for a unanimous panel of the First Circuit Court of Appeals, recently concluded that § 4205(b)(1) does not confer upon judges the power to extend the

---

[3] That RICO was aimed at large-scale, repetitive criminal operations is, of course, fully supported by the legislative history. *See, e.g.*, 116 Cong. Rec. 35193, 35196, 35208 (1970); *H.R.Rep.No. 91-1549*, 91st Cong. 2d Sess. at 35, 56, 186; *S. Rep. No. 612*, 91st Cong. 1st Sess. at 124, 158 (1969); *see* also, the legislative analysis of Title IX of the Organized Crime Control Act of 1970 (creating RICO), U.S. Code Cong. & Admin. News, 91st Cong. 2d Sess. 4007 at 4010 (1970).

[4] As the Court of Appeals did not write an opinion, it is impossible to determine if they affirmed the conviction based upon construction of §§ 1961 and 1962 or upon a finding that the proof at trial was sufficient regardless of the statutory construction.

[5] While the Sentencing Reform Act, Pub.L. No. 98-473, § 235, 98 Stat. 1834 (effective Nov. 1, 1987), may ultimately render this issue moot, it is currently a viable issue affecting many convicted defendants, as well as those indicted or to be indicted for offenses committed prior to November 1, 1987.

parole eligibility date beyond the ten-year limit of § 4205(a). *United States v. Castonguay,* 843 F.2d 51 (1st Cir. 1988).

Judge Coffin began the analysis by noting that in the 1970's several courts assumed in passing that § 4205(b)(1) only authorized early parole. *Id.* at 52-53. *United States v. Busic,* 592 F.2d 13, 26 (2d Cir. 1978); *United States v. Price,* 474 F.2d 1223, 1228 (9th Cir. 1973); *Jones v. United States,* 419 F.2d 593, 595 (8th Cir. 1969). Subsequently, by split decisions, the Eighth and Ninth Circuits held that the plain language of §4205(b)(1) permitted the sentencing court to exceed the parole eligibility limit of § 4205(a). *United States v. Gwaltney,* 790 F.2d 1378, 1388-89 (9th Cir. 1986); *Rothbeg v. United States,* 789 F.2d 647, 652 (8th Cir. 1986), and the Tenth and Eleventh Circuits concurred. *See, United States v. Berry,* 839 F.2d 1487 (11th Cir. 1988); *United States v. O'Driscoll,* 761 F.2d 589 (10th Cir. 1985).

However, after an exhaustive analysis of the legislative history, the Seventh Circuit concluded that § 4205(b)(1) does not authorize such an extension of parole eligibility. *United States v. Fountain,* 840 F.2d 509 (7th Cir. 1988).

In *Castonguay*, as in *Fountain,* after an exhaustive analysis of the legislative history, the court concluded that the legislation was viewed by those involved in the legislative process as a measure intended to authorize the early release of prisoners. 843 F.2d at 55.

The legislation was also intended to reduce disparities in sentencing and to promote joint sharing of responsibility in sentencing between judges and the parole board. Each of these objectives is furthered by interpreting § 4205(b)(1) as authorizing judges to set early release dates and each of these objectives is deterred by interpreting § 4205(b)(1) as authorizing judges to set parole eligibility dates beyond the ten-year limit established by § 4205(a). *Id.* at 55-56.

It is thus clear that had the petitioner been sentenced in the First or Seventh Circuits, and most likely in the Second Circuit as well, his sentence would have been vacated to the extent it exceeded the ten-year parole eligibility requirement of § 4205(a). The Eleventh Circuit Court of Appeals in the instant case adhered to its holding in *Berry* (see Appendix B) and refused to set aside the sentence of the petitioner, despite the provision that petitioner is not eligible for parole for a period of 13 years.

Because this case presents fundamental issues affecting the administration of justice and one of those issues has divided the Circuit Courts of Appeals, certiorari should be granted.

## Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August, 1988

Respectfully submitted,

JOHN L. POLLOK
*Attorney for Petitioner*
605 Third Avenue
New York, New York 10158
(212) 286-0300

CHARLES L. WEINTRAUB
*Of Counsel*

# APPENDICES

**Appendix A**
**Opinion of United States Court of Appeals**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

NO. 87-5331

---

D.C. Docket No. 83-8044

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

versus

ANTHONY RUGGIANO,
*Defendant-Appellant.*

---

Appeal from the United States District Court
for the Southern District of Florida

---

(March 17, 1988)

Before FAY and CLARK, Circuit Judges, and Guin,* District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

---

*Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

Judgment Entered: March 17, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/_____
Deputy Clerk

ISSUED AS MANDATE: JUL 14 1988

**Appendix B**
**Order of United States Court of Appeals**
**On Petition for Rehearing**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 87-5331

---

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

versus

ANTHONY RUGGIANO,
*Defendant-Appellant.*

---

Appeal from the United States District Court
for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING

(June 30, 1988)

BEFORE: FAY and CLARK, Circuit Judges, and GUIN,* District Judge.

PER CURIAM:

The Petition(s) for rehearing filed by appellant, Anthony Ruggiano, is denied. *See United States v. Berry*, 839 F.2d 1487 (11th Cir. 1988).

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

* Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.